

DeRALPH S. BUNTING

IBLA 79-37

Decided May 22, 1979

Appeal from decision of the Utah State Office, Bureau of Land Management, rejecting appellant's application for public sale filed pursuant to the Unintentional Trespass Act (U 16479).

Affirmed.

1. Act of September 26, 1968

Where an applicant under the Unintentional Trespass Act, 43 U.S.C. § 1431 (1976), had mistakenly described the land being sought, the application may not be amended after September 25, 1971, to conform the land description to the land actually in trespass.

APPEARANCES: Fred Kirk Heaton, Esq., Kanab, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

DeRalph S. Bunting appeals from the decision of the Utah State Office (BLM), rejecting his application for public sale, U 16479, under the Unintentional Trespass Act.

Appellant states that he and his predecessors in interest have for some years cultivated and irrigated the subject parcel of land in trespass. Appellant is also the owner of lands adjoining the subject parcel. Pursuant to the Unintentional Trespass Act (hereinafter UTA or the Act), of September 26, 1968, 82 Stat. 516, 43 U.S.C. §§ 1431-1435, appellant on September 24, 1971, filed an application for public sale of the tract considered by him to be held in trespass.

The description in the application was as follows:

T. 40 S., R. 4 1/2 W., Salt Lake meridian Section 31: SW 1/4

Appellant on appeal now alleges that he actually intended to describe the parcel as follows:

T. 40 S., R. 4 1/2 W., Salt Lake meridian Section 31: SE 1/4

Appellant did not question the accuracy of the description at any time prior to the decision appealed from, possibly because he failed to make and retain a copy of the handwritten application. The decision itself revealed the error to appellant.

Based upon independent opinions of an Idaho field solicitor (BLM), 1/ and a deputy assistant secretary of the Department, 2/ the Utah State Office, by decision dated September 21, 1978, held that amendment of a UTA application for sale "which adds lands not in the original application is invalid if it is filed after the UTA expired." We agree for the reasons stated infra.

Appellant asserts that his error in the description was innocent, and that allowance of his request would assure and protect the preference right conferred by the Act, on owners of contiguous lands, 43 U.S.C. § 1432 (1970). He also contends that where the rights of third parties are not involved, an error of the type here presented should be correctable by amendment. In support of the latter proposition, appellant argues that allowance of the amendment at this time, though nearly 8 years after the Act expired, would be merely a step toward consummation of the sale as authorized by the Act, 43 U.S.C. § 1435 (1970).

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1/ The opinion, dated February 25, 1977, was rendered in Ray Pershall, I-4398, by the Boise, Idaho, Field Solicitor's office (BLM). The opinion directed denial of a request to amend an application for public sale under the UTA, filed 5 years after the Act had expired. The opinion in Pershall relied on the authority of Nancy M. Rice, A-29076 (Dec. 10, 1962). In Rice, the assistant solicitor affirmed the BLM appeals office decision denying a request to amend a land description in an application under the Public Sale Act, 43 U.S.C. § 1171 (1958), which sought to substitute an entirely new parcel therefor. The rationale in Rice was that a moratorium announced by the Secretary precluded allowance of such a request, which was viewed as a new application.

2/ The opinion, dated July 20, 1978, was rendered in James W. Myers, (Utah) U-16482. The issue was the propriety of a classification for sale of land under the UTA pursuant to a request to amend a land description filed 1 year after the Act had expired.

The Act expired 3 years from September 26, 1968, although the Secretary was authorized, in permissive terms, to consummate applications which had been filed prior to September 26, 1971, beyond the expiration date thereof.

Appellant contends that his oversight is an innocent mistake, and that the rationale of BLM's decision is an "arbitrary technicality." We cannot agree with such a characterization. The fact is, appellant's application for public sale on its face purported to seek disposition of a tract of land not held in trespass, and therefore it is not subject to disposal under the Act.

Appellant's request that we permit him to amend his location at the present time requires analysis. First of all, it is obvious that appellant is seeking the right not only to amend but also to have his amendment relate back to his original date of application.

Although the UTA authorizes applications filed thereunder prior to September 26, 1971, to be consummated, a change in a land description is in essence the making of a new application. <sup>3/</sup> In Annie Davies, 34 L.D. 539, 540 (1906), the Department recognized this principle stating:

It is very unfortunate that the alleged error was made in the matter of the description of the described lands. That mistake, however, claimant, through her agent is solely responsible for.

If these affidavits describe the wrong lands or lands not desired by the applicant, the essential requisite for the allowance of an entry is wanting. An application to enter, of necessity, is addressed to a specific tract, and to correct an error in that respect is, in effect, to make a new application.

A similar question was considered by the Board in Junior L. Dennis, 40 IBLA 12 (1979). The syllabus of that case recites:

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<sup>3/</sup> In George Ondola, 17 IBLA 363 (1974), the Native allotment applicant sought to include land, in addition to the land originally applied for. Thus, the Board noted:

"The additional lands applied for did not result from an inability to properly identify the parcel in the original application. An attempt to gain additional land initiated subsequent to the repeal of the Allotment Act, is, in effect, a new application." (Emphasis added.) 17 IBLA at 365.

Subsequent to the passage of the Federal Land Policy and Management Act of 1976 (FLPMA), the Department lacked the authority to accept donations of land under the Act of July 14, 1960, which had been expressly repealed by FLPMA. Inasmuch as the actions of the Secretary under the Act of July 14, 1960, were not ministerial, the doctrine of relation cannot be used to validate, on a nunc pro tunc basis, an acceptance of a donation under the authority of the Act of July 14, 1960, occurring after the repeal of that Act by Congress.

Amendments and relocations of mining claims, when adverse to the original claim, have not been permitted to relate back to the date of the filing of the original claim. R. C. Jim Townsend, 18 IBLA 100 (1974). In Nancy M. Rice, A-29076 (December 10, 1962), the request by a public sale applicant to amend the application to embrace the lands which were intended to be put up for sale, in lieu of the patented lands described in her application, was denied because of an intervening moratorium on such sales directed by the Secretary. Finally, in the recent case of Junior L. Dennis, *supra*, this Board held that the doctrine of relation could not be applied to accept a gift, preferred under the Act of July 14, 1960, 74 Stat. 506, 43 U.S.C. § 1364 (1976), where the gift had not been accepted, pursuant to the applicable regulations, until after that Act had been repealed by the Federal Land Policy and Management Act of 1976, section 705(a), 90 Stat. 2792-3.

Appellant asserts that 43 U.S.C. § 1722(a) (1976) contemplates the continuing life of the Act of 1969 as follows:

Notwithstanding the provisions of the Act of September 26, 1968 . . . , with respect to applications under the 1968 Act which were pending before the Secretary as of the effective date of this subsection [enacted October 21, 1976] and which he approves for sale under the criteria prescribed by the 1968 Act, he shall give the right of first refusal to those having a preference right under Section 2 of the 1968 Act. [Emphasis in appellant's original.]

Appellant's argument falls of its own weight since an essential ingredient of a "right of first refusal" is a determination by the Secretary that "he approves [the lands] for sale under the criteria prescribed by the 1968 Act." This view is buttressed by 43 U.S.C. § 1722(b) (1976), which requires the Secretary within 3 years from October 21, 1976, to "notify the filers of applications \* \* \* whether he will offer them the lands applied for and at what price." (Emphasis added.)

We hold, therefore, that an application under the UTA cannot be amended after September 25, 1971, to include new or different lands and retain its viability. Cf. Pekka K. Merikallio, 30 IBLA 157 (1977).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case files remanded for further appropriate action.

Frederick Fishman  
Administrative Judge

I concur in the result. See separate opinion.

Joan B. Thompson  
Administrative Judge

## ADMINISTRATIVE JUDGE THOMPSON CONCURRING IN THE RESULT:

In agreeing with Judge Fishman's conclusion, I wish to stress that the situation here is not analogous to settlement claims and entries but is most analogous to the situation under the former Public Sale Act for isolated or rough and mountainous tracts of land R.S. 2455, as amended, 43 U.S.C. § 1171 (1970), repealed by section 703(a) of the Federal Land and Policy Act of 1986 (FLPMA), 90 Stat. 2789. There, like under the Unintentional Trespass Act, the application merely set into motion action by BLM to classify the land and then offer it for sale, with a preference right to contiguous land owners. The amendment of the UTA by section 214 of FLPMA, 90 Stat. 2760, 43 U.S.C. § 1722 (1976), gives a right of first refusal to purchase land offered for sale to preference right holders at their fair market values. However, this is far different from the rights of settlement claimants, including native allotment applicants, where the occupancy or settlement rights are deemed, under the doctrine of relation, to stem from the initial date of settlement (or other dates as prescribed in the law), as well as the date of the entry or patent, in order to extinguish the rights of intervening claimants. The principle of relation has no real efficacy in this case.

To permit an amendment of an application there must be some authority in the law. No such authority has been shown here. While I am sympathetic with the applicant here, I see no authority in the Unintentional Trespass Act, as amended, to substitute one completely different parcel of land for another parcel which does not embrace any of the lands described in the application after the time authorized by the amended Act. <sup>1/</sup> The application filed by appellant here has been considered by BLM and rejected because it embraces withdrawn lands. The UTA, as amended, contemplates that BLM will consider only lands described for in the application. That action has been taken.

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<sup>1/</sup> I note that it is far different in public land adjudication to find that an application need not be rejected in total because it has a description of land which embraces more acreage than allowable or is available under the statute sought, than to find that a completely different parcel of land may be substituted for that described in the application. The records of the appropriate BLM office would be posted reflecting the land sought (even though it would be in excess of that allowable) and the adjudication steps to be taken would include action on the land which may be allowed. However, where a different parcel is to be substituted, there has been no notice posted on the records until the amendatory action is sought and no prior adjudicative action would have considered such lands.

To permit the application to be amended to describe a completely different parcel, triggers another consideration. The amendment is, indeed, effectively a different application, as the subject of the application has changed.

Also, this is not the type of case to which the equitable adjudication authority set forth at 43 U.S.C. §§ 1161-1165 (1976), and 43 CFR 1871.1-1 is applicable. See, e.g., Geothermal Resources International, Inc., 17 IBLA 231 (1974), holding that the equitable adjudication authority was not applicable to authorize BLM to add an additional parcel to a geothermal steam conversion-right application after the statutory time expired. Cf. James C. Forsling, 56 I.D. 281 (1938), and the discussion therein. Here there is no entry or claim where there has been substantial compliance with the law and a patent could issue except for some slight mistake, error, or technicality which can be overlooked. There is no right stemming from the application under the UTA except to have the application adjudicated. This has been done. The underlying general equitable adjudication authority which might permit the correction of errors for entries, native allotment claims, etc., when they are ready for patent cannot be invoked here. Thus, reliance upon a case where such authority can ultimately be invoked (although it was not stated as the reason, as in Raymond Paneak, 19 IBLA 68 (1975)) is not persuasive here. In any event the Paneak case is distinguishable for other reasons because of the special problems with protracted land descriptions in Alaska which created special equities. Such problems and equities are not involved here.

Joan B. Thompson  
Administrative Judge

## ADMINISTRATIVE JUDGE BURSKI DISSENTING:

The issue presented by the instant appeal is simply stated: may an applicant under the Unintentional Trespass Act, Act of September 26, 1968, 82 Stat. 516, 43 U.S.C. §§ 1431-35 (1970), amend an erroneous land description to conform it to the original intentions of the applicant? The majority answers in the negative. I disagree.

The basic difficulty in this case arises from the fact that the Unintentional Trespass Act, supra, by its own terms, expired on September 26, 1971, save for such applications which had been filed in the 3-year period of the Act's duration but had not yet been processed by BLM. The majority, in essence, holds that an amendment of the land description must be treated as a new application and thus cannot be permitted. While recognizing the validity of the precedents cited by the majority, I feel that they are being misapplied in the instant case. Moreover, the majority decision ignores other precedents which argue for an opposite conclusion.

The majority notes:

Amendments and relocations of mining claims, when adverse to the original claim, have not been permitted to relate back to the date of the filing of the original claim. R. C. Jim Townsend, 18 IBLA 100 (1974). In Nancy M. Rice, A-29076 (December 10, 1962), the request by a public sale applicant to amend the application to embrace the lands which were intended to be put up for sale, in lieu of the patented lands described in her application, was denied because of an intervening moratorium on such sales directed by the Secretary. Finally, in the recent case of Junior L. Dennis, supra, this Board held that the doctrine of relation could not be applied to accept a gift, proffered under the Act of July 14, 1960, 74 Stat. 506, 43 U.S.C. § 1364 (1976), where the gift had not been accepted, pursuant to the applicable regulations, until after that Act had been repealed by the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (1976).

While I readily admit that the cases cited by the majority maintain the positions for which they are cited, 1/ the majority decision ignores other precedents which lead me to an opposite conclusion.

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1/ The citation of Annie Davies, 34 L.D. 539 (1906), however, is singularly inappropriate. The Davies decision involved the efficacy of an affidavit to correct a misdescription in a prior affidavit. That decision merely holds that, in accordance with the statute, the second affidavit was ineffective since it was not sworn to in the county, parish or land district where the land was located.



Thus, while the concept of an amendment relating back to the date of an original action is admittedly rare in public land matters, it is not unknown. In Sandra L. Lough, Damon M. Blackburn, 25 IBLA 96 (1976), appellant Blackburn was permitted, in the circumstances of his case, to amend an entry to include land which he had occupied but had not filed for, even in the face of an intervening withdrawal. Id. at 101-06. In James A. Shipler, A-25197 (November 23, 1948), the Department permitted a desert-land applicant to amend his land description and relate the amendment back to the date of his original application and retain his priority over another applicant who had filed subsequent to the original application but prior to the filing of the amendment. Similarly, although the Board has rejected attempts to amend Native allotment applications to embrace additional lands not applied for prior to December 18, 1971, the date of the repeal of the allotment act, see George Ondola, 17 IBLA 363 (1974), it has permitted amendment of an application, pursuant to Secretarial guidelines, where a misdescription was the result of an inability to properly identify the site of the land on a protraction diagram. Raymond Paneak, 19 IBLA 68 (1975).

The two cases which are most similar to the instant appeals are the Paneak and Dennis cases. Both cases involved actions which occurred after the Congressional authorization had expired. In Paneak, however, an amendment of an application to conform it to the land actually sought was permitted after the repeal of the Alaskan Native Allotment Act by FLPMA. While in a large sense Paneak was animated by the problems which have commonly beset entrymen and others in Alaska in attempting, by means of a protracted survey, to accurately predict the exact physical location of their entry, see generally 43 CFR 2561.1(c), I feel that the Paneak case is the proper precedent to guide our decision.

In both Paneak and the present case the allegation made on appeal was that through error the actual land sought was not the land described on the application. Both the Alaska Native Claims Settlement Act, 85 Stat. 688, 43 U.S.C. § 1601 (1976) (which repealed the Alaska Native Allotment Act), and section 5 of the Unintentional Trespass Act, 43 U.S.C. § 1435 (1976), provided express authorization for the continued processing of pending applications after termination of the authority to accept new applications. In both situations there were two separate requirements imposed upon applicants prior to repeal of the statutory authorization. In Native allotments, the applicant must have occupied and used the land in a manner potentially exclusive of others, and must have applied for an allotment prior to December 18, 1971. In unintentional trespass situations, the land must have been used in trespass, and the application must have been filed prior to September 26, 1971. Appellant herein made a timely application under the Unintentional Trespass Act, and there is no question from the case record that the land which he actually sought in the SE 1/4 was trespassed land. Thus, within the factual

milieu of this case, I think it was error for the State Office to refuse to permit the applicant to amend his application to correctly describe the land for which he wished to apply. 2/

The Dennis case does not militate against this decision. The rationale of the Dennis case was that the authority of the Department to accept donations under the 1960 Act had been expressly repealed prior to the attempted acceptance by the Department. There was, however, no savings clause in FLPMA which would permit consummation of actions initiated under prior statutory authorizations. The statutory authority of the Department to act under the 1960 Act having been revoked, the Department lacked the power to accept, on a nunc pro tunc basis, the proffered land.

I would hold, therefore, that nothing in the Unintentional Trespass Act, supra, prohibits the amendment sought herein. Accordingly, I would reverse the decision being appealed.

James L. Burski  
Administrative Judge

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2/ It might be helpful to clarify one point. While appellant seeks to have the land description changed from the SW 1/4 sec. 31 to the SE 1/4 sec. 31, the actual land which he seeks is the SW 1/4 NW 1/4 SE 1/4, and SW 1/4 NW 1/4 NW 1/4 SE 1/4 of sec. 31, aggregating approximately 12-1/2 acres. Under the majority theory, it is permissible to describe too much land, but fatal to make an error in description.

IBLA 79-37	:	U-16479
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41 IBLA 13	:	Public Sale
		:
DeRalph S. Bunting	:	Errata

### ERRATA

The last paragraph of the above cited decision is amended to read as follows:

"Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed."

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Frederick Fishman  
Administrative Judge

We concur:

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Joan B. Thompson  
Administrative Judge

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James L. Burski  
Administrative Judge

#### APPEARANCES:

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